PAN AH BA & ANOR. v. NANYANG CONSTRUCTION SDN. BHD.

[O.C.J. (Pawan Ahmad J.) October 25, 1968]
[K.L. — Civil Suit No. 356 of 1967]

Land Laws — Sale of land — Option agreement — Payment of deposit — Forfeiture — Whether justified — Equitable relief.

The plaintiffs sued the defendants as administrators of the estate of one *N* deceased for the recovery of $10,000 which had been paid by the deceased as deposit for the purchase of a three storey shop house in Kuala Lumpur. Clause 3 of the option agreement dated April 23, 1964 signed by *N* stated: "I/We will enter into formal agreement in the form and on such terms and conditions as your solicitors shall prescribe within fourteen (14) days from your giving notice requiring me/us to do so (time being of the essence). Failure to comply with such notice shall entitle you to forfeit the said deposit as liquidated damages and this agreement shall become null and void and of no further effect and I/we shall not be entitled to make any claim against you nor to any right title or interest in the property."

The defendants sent a notice as required by the said clause on June 1, 1964 and two reminders on July 8, 1964 and August 5, 1964. On August 19, 1964 *N* wrote to the defendants requesting for a copy of the formal agreement for perusal. The defendants then sent a third reminder on August 20, 1964 whereupon on August 28, 1964 *N* wrote to the defendants to resell the property and requested for the return of the deposit. As the defendants did not reply *N* sent another letter on October 7, 1964 requesting for a reply and stated that she did not agree to the terms and conditions of the offer of purchase. The defendants did not reply to the said letter but subsequently on December 14, 1964 sent a further reminder calling upon *N* to sign the formal contract and pay the further sum of $18,910 or otherwise they would cancel the transaction and forfeit the deposit and resell the property. On December 17, 1964 *N* replied by saying that the defendants could resell the property but that they should not forfeit the deposit for otherwise she was prepared to purchase the property upon terms to be agreed.

The defendants sold the property after the expiry of the period of their last notice for the sum of $88,750 i.e. the original sale price.

Held: (1) the failure of the defendants to cancel the contract immediately upon completion of the period of notice of 14 days was not fatal. The failure coupled with the extention of time merely removed the element of time as being the essence of the contract;

(2) *N* had committed a breach of the contract long before the defendants cancelled it;

(3) it was the intention of the parties that the deposit was a guarantee or security for the due performance of the contract and it was liable to forfeiture;

(4) the sum of $10,000 paid as deposit was reasonble for the contract of sale of the land and no equitable relief should be granted in this case.

Cases referred to:—

(1) *Fateh Chand* v. *Balkishan Dass* A.I.R. 1963 S.C. 1405, 1410.

(2) *Jagatheesan* v. *Linggi Plantations Ltd.* [1967] 1 M.L.J. 177, 179.

(3) *S.S. Maniam* v. *The State of Perak* [1957] M.L.J. 75.

(4) *Chunni Lal* v. *Mohan Lal* A.I.R. 1964 M.P. 126, 128.

(5) *Naresh Crandra Guha* v. *Ramachandra Samantha* (1951), 55 C.W.N. 765, 775.

(6) *W.J. Younie* v. *Tulsiram Jankiram* I.L.R. 1942 Cal. 382.

(7) *Tay Say Geok* v. *H.G. Warren* [1963] M.L.J. 179.

CIVIL SUIT.

Richard Talalla for the plaintiffs.

Chooi Mun Sou for the defendants.

Cur. Adv. Vult.

Pawan Ahmad J.: The plaintiffs are the administrators of the estate of their mother one Ng Lye Heong (deceased) and the defendants were at all material times the owners of a housing estate known as Happy Garden, Jalan Tiong, Kuala Lumpur.

On 23rd April 1964 the deceased executed a contract (P.3) to purchase a three-storey shop house, Lot 358 section 85 Jalan Tiong, Kuala Lumpur, the property of the defendants and in furtherance of that contract she paid at that time a deposit of $10,000 to the defendants.

P.3 is a standard printed form prepared by the defendants as a form of contract to be entered into by a prospective purchaser and the defendants in their capacity as sellers. For the purpose of this case it will be necessary for me to reproduce only clause 3 of P.3, and it reads as follows:—

"3. I/We will enter into formal agreement in the form and on such terms and conditions as your solicitors shall prescribe within fourteen (14) days from your giving notice requiring me/us to do so (time being of the essence). Failure to comply with such notice shall entitle you to forfeit the said deposit as liquidated damages and this agreement shall become null and void and of no further effect and I/we shall not be entitled to make any claim against you nor to any right title or interest in the property."

By reason of clause 3 of P.3 it is apparent that the deceased agreed to enter further into a formal agreement with the defendants in the form and on such terms and conditions as the defendants' solicitors would prescribe within 14 days from the defendants giving her notice to do so. In the present case the defendants sent such a notice to the deceased on 1st June 1964 informing her that the formal agreement was ready for her signature and she was to call at the office of the defendants' solicitors, Messrs. Allen & Gledhill, Kuala Lumpur, and to sign the formal agreement and to pay the sum of $18,910 to meet the second payment including solicitors' charges and stamp fees. The deceased, however, did not go to the office of Messrs. Allen & Gledhill as requested and so the defendants later sent two reminders to the deceased dated 8th July 1964 and 5th August 1964 respectively.

Then on 19th August 1964 the deceased sent a letter to the defendants acknowledging the

receipt of defendants second reminder and in the same letter she requested for a copy of the formal agreement for her perusal first before signing it. On 20th August 1964 the defendants sent a third reminder giving notice to the deceased to sign the formal agreement within 7 days and if the deceased failed to comply with the notice the defendants would resell the property to other purchaser on the waiting list. Then on 28th August 1964 the deceased sent a reply saying that she would be grateful if the defendants would resell the property to other purchasers on the waiting list and return the deposit of $10,000. The defendants did not reply to this letter and so the deceased sent another letter on the 7th October 1964 asking for a reply and stating that she did not agree to the terms and conditions of the offer to purchase. The defendants did not reply to this letter too, but subsequently on 14th December 1964 sent a final reminder stating that if the deceased failed to sign the formal agreement within 7 days and pay the sum of $18,910 due on signing the formal agreement the defendants would cancel the transaction and forfeit the deposit and then resell the property to other purchasers on the waiting list without further reference to the deceased. On 17th December 1964 the deceased sent a reply, *inter alia*, saying that the defendants could resell the property but should not forfeit the deposit and if otherwise the deceased was prepared to purchase the property upon terms to be agreed.

The property was subsequently resold by the defendants to a third person for the sum of $88,750 after the notice period of 7 days stated in their letter of 17th December 1964 had lapsed and they also forfeited and retained the deposit.

The plaintiffs are now claiming for the return of this deposit for the benefit of the estate of the deceased. The issue before the court is whether the defendants are entitled in the circumstances to forfeit and retain the deposit.

The first contention of the plaintiffs is that the defendants in their letter of 20th August 1964 made no mention about forfeiture but merely said that they would resell the property to other purchasers on the waiting list and as the deceased agreed to this course the contract was rescinded or alternatively disposed off or remitted wholly by the defendants. The defendants, on the other hand, argued that this letter was meant to be a warning. It is reasonable in the circumstances to infer that this letter of the defendants was sent in pursuance to clause 3 of P.3 as a warning that if the deceased failed to comply with the notice within 7 days then the property would be resold to some other person and the deposit would be forfeited under the said clause. I therefore have no hesitation in rejecting this contention of the plaintiffs.

Their second contention is that the deceased never repudiated the contract expressly or by conduct amounting to repudiation and they went on to say that on the contrary the defendants had waived time being the essence of the contract because the defendants did not repudiate the contract at the end of the 14 day period in terms of clause 3 and also because the defendants sent several letters offering extention of time thereafter. Under the terms and conditions of clause 3 P.3 the deceased agreed to sign the formal contract within 14 days upon receipt of notice to do so and on that occasion she was to make the second payment on the instalments in accordance with the form set out at page 18 of P.1. The deceased however failed to execute the formal agreement on receipt of the notice under clause 3 aforesaid and inspite of several reminders requesting her to do so including the final reminder dated 14th December 1964.

In my view the failure of the defendants to cancel the contract immediately upon completion of the period of notice of 14 days is not fatal. This failure coupled with the offers of extention of time by the defendants merely remove the element of time as being the essence of the contract. The contract still subsists and can be cancelled by the defendants after giving reasonable notice of their intention of doing so if the deceased persists not to sign the formal agreement. In this case more than reasonable notice was given to the deceased. Further, upon reading together the deceased's letters dated 15th September 1964 and 7th October 1964 it is clear that she had no intention of honouring the present terms and conditions of the contract. This is even made clearer by the letter of the deceased's solicitor dated 17th December 1964 wherein it is stated in the last sentence that the deceased was only prepared to purchase the property upon terms to be agreed. I therefore hold that the deceased had committed a breach of the contract long before the defendants cancelled it.

The third contention of the plaintiffs is that the deposit of $10,000 was never paid by the deceased to the defendants as guarantee or security for the performance of the contract of sale because such words were not incorporated in the contract P.3. In support of this argument counsel for the plaintiffs referred to the case of *Fateh Chand* v. *Balkishan Dass* [1] which reads:—

> "It cannot be assumed that because there is a stipulation for forfeiture the amount paid must bear the character of a deposit for due performance of the contract."

Counsel for the plaintiffs therefore urged the court to interpret the forfeiture clause relating to the deposit to amount to a penalty and on that ground forfeiture of the deposit should not be allowed. Counsel further argued that although Gill J. in *Jagatheesan v. Linggi Plan-*

tations Ltd.[2] held that deposits are not governed by section 75 of the Contracts (Malay States) Ordinance 1950 he was then relying on old decisions of the High Court in India but these decisions have since been reversed by the decision of the Supreme Court of India in *Fateh Chand* v. *Balkishan Dass, supra.*

I am unable to agree to this argument by counsel for the plaintiffs because on a close scrutiny of the case of *Fateh Chand, supra,* it will be seen that in that case the Supreme Court of India held that even though there was a forfeiture clause only the sum of Rs. 1,000 paid as earnest money at the time when the contract was signed was liable to forfeiture but the sum of Rs. 24,000 stipulated to be paid out of the price on delivery of possession on a subsequent date was not liable to forfeiture. Therefore the decision in *Fateh Chand* v. *Balkishan Dass, supra,* merely supports the previous decisions of the High Courts of India which were relied upon by Gill J. in the case stated earlier. (See also the case of *S.S. Maniam* v. *The State of Perak*[3]). Section 75 of the Contracts (Malay States) Ordinance therefore does not apply in this case. In *Chunni Lal* v. *Mohan Lal,*[4] it was held that when the amount is paid at the time of the agreement itself a condition of a guarantee for the performance of the contract is more probable than when the amount is paid sometime later. In the case of *Naresh Chandra Guha* v. *Ramachandra Samantha,*[5] it was held that when money is paid at the time of the agreement, whether it is called earnest money or deposit money or by any other name it is presumed to be earnest or security and liable to forfeiture on breach. It was also held in *W.J. Younie* v. *Tulsiram Jankiram* [6] that a deposit in the nature of a guarantee for the performance of a contract is forfeitable upon default made by the depositor and the forfeiture is justified whether the amount is reasonable or not unreasonable.

In the present case time was agreed upon to be the essence of the contract when the contract was executed and the deposit of $10,000 was paid. Moreover under clause 3 of P.3 the defendants were entitled to forfeit the deposit if the deceased failed to comply with the notice within 14 days. In these circumstances, I find as a fact that it was the intention of the parties that the deposit was a guarantee or security for the due performance of the contract and it is therefore liable to forfeiture. I therefore once again reject the plaintiff's third contention.

The fourth contention of the plaintiffs is that the defendants did not suffer any damage because the defendants resold the property to a third person for the same price of $88,750. The plaintiffs stated that as the defendants did not give any notice under section 56(3) of the Contracts (Malay States) Ordinance, the defendants are not entitled to claim any compensation at all.

I am unable to accept this argument because it appears that this provision of the law only applies to those cases where the contract is performed between the parties outside the stipulated time. In the present case the contract was never performed between the parties at all and therefore this argument also fails.

Lastly, the plaintiffs seek equitable relief by saying that it is unconscionable to make the deceased forfeit the deposit because the terms and conditions of the contract were completely one-sided and unfavourable to the deceased. P.W.1 however admitted in cross-examination that the document at page 19 of P.1 was explained to the deceased and himself by the defendants when P.3 was signed. He further admitted that according to this document the second instalment of $18,750 would be due on signing the formal agreement and that the deceased was aware of this and that she was also aware that she had to execute this document in due course. P.W.1 however denied that D.W.1 explained the terms and conditions contained in clause 3 of P.3. On the other hand, D.W.1 stated that he explained the contents of clause 3 of P.3 to the deceased when P.3 was executed on 23rd April 1964. The deceased also handed over $10,000 made up of $6,000 in cash and $4,000 in cheque as deposit when P.3 was signed. In these circumstances, I am of the opinion that she would not have handed that large sum of money as deposit to the defendants unless the contents of all the documents including P.3 which were brought to her notice on the day when the contract was signed were explained to her and that she was satisfied with their contents. In the case of *Tay Say Geok* v. *H.G. Warren,*[7] Thomson C.J. as he then was said:—

> "The amount involved is not disproportionate. It is 10% of the purchase price which is the usual amount of the deposit in a contract for the sale of land. The purchaser knew that he would lose it if he did not complete. There is no suggestion of any imposition or sharp practice or anything of the sort. In view of the purchaser's conduct it is difficult to see any ground on which it can be said that the vendor's action in retaining the money is unconscionable."

In the present case the sum of $10,000 paid as deposit works out to about 12.7% of the purchase price of the property and in my view this sum is reasonable for the contract of sale of land and I therefore also reject the plaintiffs' claim on equitable relief.

The plaintiffs' claim is therefore dismissed and there will be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors: *Richard Talalla & Menon; Chooi & Co.*